Supreme Court of the United States

OCTOBER TERM, 1901.

No. 137.

J. C. LEAGUE, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

Error to the Supreme Court of Texas.

Brief and Argument for Plaintiff in Error

IN REPLY TO

Brief and Argument of Defendant in Error.

QUESTION OF JURISDICTION.

Counsel for defendant in error concedes (brief, p. 3,) that Federal Questions were raised and properly presented in the State Courts, and that final judgment has been rendered by the Supreme Court of Texas, the highest court of said State. But he contends that the federal questions were not necessarily involved in the decision, and that the case was decided upon issues entirely of state concern, pertaining entirely to the method for the levy and collection of taxes and to matters of pleading. (Brief, 4 and 5.)

On the other hand, plaintiff in error contends that the courts of the State of Texas in the enforcement of a special judicial proceeding under the provisions of chapter 103 (General Laws of Texas of 1897) are about to deprive him of his property without "due process of law," by serving him with

process in a court of general jurisdiction, and under the semblance of the exercise of the equitable jurisdiction of this court, compelling him to abandon his property or to appear as a defendant in a special judicial proceeding for the foreclosure of tax liens, under the provisions of said chapter 103, which usurp the judicial function of establishing liens for taxes, interest, penalties and costs, and which deny to subsequent purchasers or owners of the land involved, the right to make any defense, save that of payment of the taxes claimed. Plaintiff in error also contends, that said act when enforced by foreclosure in this proceeding of alleged liens on his lands, will deprive him of his property, without due process of law, by forcing him to abandon his land, or to pay certain sums of money, arbitrarily and retroactively charged against said lands as interest, fees and costs of suit, although said sums, first imposed in 1897 after said taxes had been assessed, could not be either interest, fees or costs of suit or in any sense incidents of the taxes accruing prior to 1897—and further, that these retroactive exactions are prohibited also by the Constitution of the State of Texas, and that the record in this case shows that the State courts have violated the constitutional guarantee by sustaining said charges, and holding in effect that the State might assert title to these lands, and foreclose its lien in the same suit.

Plaintiff in error respectfully suggests that while the decision of our Supreme Court of Texas in this case may seem to determine only "questions of State concern," as urged by defendant in error—its necessary operation and effect, as a judgment in a special judicial proceeding under chapter 103, Laws of Texas, 1897, to enforce a lien for taxes and for charges created by said act, is a denial of "due process of law," and we ask an examination of the record and of this act of 1897, in determining the revisory jurisdiction of this court; and without discussing the authorities cited on this question of jurisdiction to revise the determination of federal questions, we concede the test of this jurisdiction as fixed by this Court in its opinion delivered by Chief Justice Waite in

Brown vs. Atwell (92 U. S., 327), and quoted by counsel as follows:

"It is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal Question was argued and presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

But we do not interpret the language of the court to mean that a State court may by its disposal of the case, ignore or evade a federal question when it has been regularly raised, and when it is a controlling issue in the case.

Remark: Counsel for defendant in error has fallen into error on page 2 of his brief, in stating the contention of plaintiff in error, as the latter does not urge that section 13 of said chapter 103 is retroactive. This section prescribes the terms on which lands that have been purchased by the State at tax sales may be redeemed. It was entirely competent for the Legislature to provide for redemption on any terms it may deem expedient, and the only reference to this section in our brief (page 14), is to the last clause prohibiting retroactive exaction of the 10 per cent penalty, this clause having been referred to "in arguendo" to show that the Legislature itself, in this instance, recognized the injustice of retroactive penalties.

Counsel is mistaken also in his summary (on same page) of the propositions of plaintiff in error. He says that plaintiff in error objects "2nd to that portion of the law which sets aside a previous sale of property bought in by the State, and places said property under the provisions of the law, subjecting it to a foreclosure of the tax lien, is retroactive * * * and therefore void." There is no express provision in this act renouncing the State's rights under this sale, the jurisdictional fact upon which the foreclosure proceeding is based, is the fact that the land had been sold to the State for taxes (section 2 of the act quoted on page 7 of our brief). If this

act had set aside previous sales, as assumed by counsel, the offer of redemption in section 13 thereof would be meaningless, and the Supreme Court of Texas could not have found as a fact in this case that, by reason of the sale of the lands in question to the State for the taxes of 1884, the State had title to these lands.

REPLY TO COUNTER-PROPOSITIONS AND ARGUMENT OF DEFENDANT IN ERROR.

I.

Following the order in briefs heretofore filed, and referring to propositions under Second Specification of Error (brief, pages 5 and 6), and to counter-proposition of defendant in error (page 7).

We concede that the method of summary seizure and sale by the collector, in force in Texas prior to the enactment of chapter 103, acts of 1897, was expressly authorized by the State Constitution, and that the method constituted due process, and we have in fact contended, before the State courts in this case, that said method was the only method permissible under the State constitution. But the court in this case, following City of Henrietta vs. Eustis, in 87 Texas, 14, holds the remedy under chapter 103 to be cumulative, and this question pertaining solely to a construction of the State constitution is not open to revision by this court, and we concede also that the right to redeem is not a vested right, and after the lapse of the period of two years fixed by the constitution, the terms on which redemption will be permitted, are entirely within the control of the Legislature. But we expressly deny any contention that the sale of the lands in question for the taxes of 1884 operated any forfeiture of title to the State, or vested any right in the State, other than the right to establish title through its courts by showing compliance with all the prerequisites required to divest the owner of his title. (See authorities cited on page 10 of brief; also McCormick vs. Edwards, 69th Texas, 106, which holds also that the purchaser

at a void tax sale can not recover even the taxes assessed upon the land and paid by his purchase.)

If the State court in deciding this case had reversed its line of decisions from the foundation of its government, and in construing the State constitution had held that a summary sale for delinquent taxes by the tax collector operates, "ipso facto," a forfeiture of the title of the delinquent taxpayer, the decision would have been a matter of state concern, unless this court is ready to hold that forfeiture by tax sale without office found, violates the constitutional guarantee of due process. But this question need not be met, because in every case in this State, where title has been asserted under a tax deed, it has been uniformly held that the purchaser claiming under the tax deed can not maintain his title against the delinquent owner, without showing in a court of competent jurisdiction that every prerequisite prescribed by the law has been fully complied with, and that the sale has been made in accordance with law; and in the case at bar the State courts do not overrule these decisions, or hold that a tax sale operates a forfeiture of the delinquent taxpayers' title. It is a fact that the opinions suggest a sort of quasi-forfeiture sufficient, it is contended by counsel, to warrant the State in maintaining this foreclosure proceeding against subsequent purchasers as well as against the delinquent taxpayer, and sufficient to warrant the enforcement of the ex-post-facto penalties and fees, notwithstanding the prohibition of the State constitution against retroactive laws, and the prohibition of State and Federal constitutions against arbitrary exactions. On p. 11 of their brief, counsel for plaintiff in error, call attention to the fact that the Court of Civil Appeals holds, that the act does not authorize suit for the taxes of 1884, and that the judgment as finally rendered does foreclose a lien for 1884, and that therefore there is no condemnation and resale for the same taxes. This we concede, but it suggests a query, as to how the State could relinquish the tax for 1884, and at the same time assert right of forfeiture under the sale for the taxes of that year.

If, as counsel seem to claim (page 9 of their brief), the State

of Texas has, by the act in question waived its rights under the sale for taxes of 1884, and provided for the establishment and foreclosure of its lien under the general equity jurisdiction of its courts, and in accordance with well recognized principles of equity jurisprudence, then the procedure prescribed by this act is "due process," and the trial court merely erred on questions of pleading and practice, in overruling defendants' 3rd and 4th demurrers (Rec., p. 4). But such is not the case, and on this question of waiver of rights under the tax sale of 1884, there seems to be some difference of opinion between counsel for the State and the State courts, as the courts hold this waiver to be operative only in the event the adverse claimant shall see fit to accept the terms dictated for those who may desire to redeem under section 13.

Chief Justice Garrett, delivering the opinion of the Court of Civil Appeals (Rec., p. 24), says: "The offer of the State is to waive this forfeiture and restore the land to the owner *if* he will only pay the taxes accruing since then, and 6 per cent interest thereon, together with the costs that had been incurred in making the sale and in making up the delinquent lists and of the suit. The State has waived its right of forfeiture *on condition* that the taxes with interest and costs shall be enforced against the land."

Chief Justice Brown in delivering the opinion of the Supreme Court (Rec., p. 45), says: "The State having acquired title, had the power to waive its right, and in order to perfect the claim, beyond all dispute, to foreclose its lien on the land as against the then claimant, and in doing so had the authority to prescribe such terms as it deemed proper and just. The claimant of the land being a party, defendant could have disclaimed any interest in it, and might thus have escaped any costs for proceedings had after such disclaimer." This language is, we believe, a clear cut interpretation of the intent of the act (chap. 103), and under it there is no alternative; the claimant of the land must satisfy the demands of the State, or give up his claim, and this is accomplished, we submit, by giving to a strictly legal foreclosure, to enforce tax liens, the

garb and semblance of a suit in equity to foreclose a lien under the general powers and jurisdiction of a court of equity. It is true, as contended by counsel for the State, that the sovereign can not be delayed in the collection of its taxes by tedious suits in equity to determine who is the rightful owner of the land. Proceedings for the collection of taxes are exceedingly summary and necessarily so. But the State can not, we submit, invoke the equitable powers of its courts to enforce its claims against adverse claimants or strangers, without subjecting itself to the jurisdiction of the court, and submitting to a determination of the case, upon the established principles of equitable jurisprudence, and we submit that an examination of the provisions of this act (chap. 103) will show that there is no intent to raise any questions of equitable jurisdiction whatever, but simply to bind all persons who may be made parties, regardless of any question of adverse title prior assessment, delinquency, or privity of title or estate. The record shows that these lands were assessed to parties other than this defendant, and to unknown owners (pp. 10 and 11); that plaintiff in error purchased them about 1889 (pp. 2 and 5); it does not show that any privity existed between him and the parties to whom the land belonged. The lien for taxes in this State is fixed by the assessment.

In State of Texas vs. Farmer (59 S. W. Rep., 541), Chief Justice Brown, in delivering the opinion of the court, says: "The lien of the State under the provisions of the constitution arises out of the assessment of the property, and does not exist until that assessment is made," and in Yenda vs. Wheeler, 9 Texas, the Supreme Court holds that an assessment to a person who is not the owner is invalid.

Justice Wheeler, delivering the opinion of the court, says (419): "The assessment in this case was made in the name of the supposed owner, M. Yenda. This, however, was a mistake. Manuel Yenda was neither the owner nor the grantee; he died several years before the grant was made. Caciana Sambrano was the grantee, and the owners were her heirs, the present plaintiffs."

This case is still the rule of property in this State; although called to the attention of the court in this case it was not questioned or overruled, and is beyond question the rule of property in suits between citizens of this State, and we respectfully insist that the State can not under this chapter make a different rule for the State, and in this feature of the act, as well as in the provision for an attorney's fee, we claim that the State discriminates in favor of itself as a litigant in its courts, against its citizens, and the act both discriminates against taxpayers as a class, and denies them due process of law.

Attention is respectfully requested to the following provisions of chapter 103, Laws 1897, which, we submit, show that said act as construed and enforced by the State courts in this case, will deprive plaintiff in error of his property without due process of law:

Sec. 2. All lands or lots which have been returned delinquent, or reported sold to the State, or to any city or town for taxes due thereon since the first day of January, 1885, or which may hereafter be returned delinquent or reported sold to the State or to any city or town, shall be subject to the provisions of this act, and said taxes shall remain a lien upon the said land, although the owner be unknown or though it be listed in the name of a person not the actual owner, and though the ownership be changed, the land may be sold under the judgment of the court for all taxes, penalty and costs shown to be due by such assessment for any preceding year.

Sec. 3. It shall be the duty of the Commissioners' Court of each county in this State immediately upon the taking effect of this act to cause to be prepared by the tax collector, at the expense of the county (the compensation for making out the delinquent tax record to be fixed by the Commissioners' Court), a list of all lands, lots, or parts of lots sold to the State for taxes since the first day of January, 1885, and which have not been redeemed, in their respective counties, and unorganized counties attached thereto, and to have such lists recorded in books to be called the "Delinquent Tax Record," showing

when the lands or lots were reported delinquent or sold to the State for taxes, also the name of the owner at the time of such sale or delinquency, if known, the numbers of acres, the amount of taxes due when first sold, and the amount of all taxes assessed against the owner thereof and returned delinquent for each year as shown by the records of the tax collector's office; and in making up the list or lists contemplated by this act, corrections and omissions in the description of any real estate embraced in such list or lists shall be made, so that when the corrections are made and the omissions supplied, the description will be such as is given in the abstracts of all the titled and patented lands in the State of Texas, or as required in section 12 of this act, such as may be furnished by the Commissioner of the General Land Office, and it shall be required in bulk assessments, to apportion to each tract or land separately, its pro rata share of the entire tax, penalty and cost. The list for each county, when certified to by the county judge, and assessment rolls and books on file in the tax collector's office, shall be prima facie evidence that all the requirements of the law have been complied with by the officers charged with any duty thereunder, as to the regularity of listing, assessing, levying of all the taxes therein mentioned, and reporting as delinquent or sold to the State any real estate whatsoever, and that the amount alleged against said real estate is a true and correct charge. * * *

Sec. 5. Upon the completion of said Delinquent Tax Record by any county in this State, it shall be the duty of the Commissioners' Court to cause the same to be published in some newspaper published in the county, for three consecutive weeks. * * *

Sec. 6. Twenty days after the publication of such notice, or as soon thereafter as practicable, the Commissoners' Court, or the county judge acting for said court, shall file a list of all lands so advertised for taxes due for any year or number of years, the tax on which remains unpaid, with the county clerk of the county in which such lands are located, or if unorganized, then with the county clerk of the county to which said unorganized

county may be attached for judicial purposes, and are to be sold under the provisions of this act, for all the taxes, interest, penalty, and costs, and shall cause suit to be filed in the name of the State of Texas, in the District Court of said county, or if unorganized, then, in the District Court of the county to which said unorganized county is attached for judicial purposes, stating therein by apt reference to lists or or schedules annexed thereto, a description of all lands or lots in such county upon which taxes and penalty have remained unpaid for any year or number of years since the first day of January, 1885, and the total amount of such taxes, with interest computed thereon to the time fixed for the sale thereof at the rate of six per cent per annum, and shall pray for judgment for the payment of the several amounts so specified therein, and in default thereof, that such lands be sold to satisfy said judgment for all taxes, interest, penalty, and costs, and for such other relief to which the State may be entitled under the law and facts. All suits to enforce the collection of taxes, as provided in this act, shall take precedence and have priority over all other suits pending in the District Court. The petition in such suits shall be signed by the attorney bringing the suit, and shall be verified by the affidavit of said attorney, or the county judge, to the effect that the averments contained in said petition are true to the best knowledge and belief of affiant, and the pleadings of the defendant, except those of law, shall be verified by like affidavit of the defendant, his agent or attorney. The County Collector, County Clerk and County Assessor shall furnish all affidavits, certified copies of the records of their respective offices, and such other evidence as may be in their possession by virtue of such office, as may be applied for by the County Attorney.

Sec. 7. The proper persons shall be made parties defendant in such suits and shall be served with process, and other proceedings had therein as provided by law for suits of like character in the District Courts of this State; and in case of foreclosure, an order of sale shall issue, and the land sold

thereunder as in other cases of foreclosure. * * *

Sec. 9. The county attorney, or district attorney in counties where there is no county attorney, shall represent the State and county in all suits against delinquent taxpayers that are provided for in this act, and all sums collected shall be paid immediately to the county collector.

In no case shall the compensation for said county attorney be greater than three dollars for the first tract in one suit, and one dollar for each additional tract, if more than one tract is embraced in same suit to recover taxes, interest, penalty, and costs; provided that those county attorneys who may have heretofore or may hereafter institute said suits, shall be entitled to an equal division with their successor in office of the fees allowed herein on all suits instituted by them, where the judgment has not been obtained prior to the vacation of their office. The collector of taxes, for preparing the delinquent list and separating the property previously sold to the State from that reported to be sold as delinquent for the preceding year, and certifying the same to the Commissioners' Court, shall be entitled to a fee of one dollar for each correct assessment of the land to be sold, said fee to be taxed as costs against the delinquent. The sheriff shall be entitled to a fee of $1.00 for selling and making deed thereto to each purchaser of land that he sells under judgment for taxes, which fee shall be taxed as costs of suit, and the District Clerk shall be entitled to a fee of one dollar and fifty cents in each case, to be taxed as costs of suit. And the County Clerk, for making out and recording the data of each delinquent assessment, and for certifying the same to the Commissioners' Court for correction, and for noting the same in the minutes of the Commissioners' Court, and for certifying the same, with corrections, to the Comptroller, and noting the same on his delinquent tax record, shall receive the sum of one dollar, to be taxed as costs against the land in each suit; provided, that in no case shall the State or county be liable for such fees, but in each case they shall be taxed as costs against the land to be sold under judgment for taxes and paid out of the proceeds of sale of same

after the taxes, penalty, and interest due thereon to the State are paid; provided, that where two or more unimproved city or town lots belonging to the same person and situated in the same city or town shall all be included in the same suit and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number less than ten, taxed against them collectively just as if they were one tract or lot; and, provided, further, that where suits have been brought by the State against delinquents to recover tax due by them to the State and county, the said delinquent may pay the amount of the tax, interest, penalties, and all accrued costs to the county collector during the pendency of such suit, and the county attorney shall receive as compensation therefor two dollars for the first tract and one dollar for each additional tract embraced in said suit, and the District Clerk shall receive only one dollar, and the sheriff only one dollar in each case; but these fees shall be in lieu of the fees provided for such officers where suits are brought as herein before provided.

Sec. 15. * * * In all suits for taxes due the defendant shall be entitled to credits he can show due him for any year or number of years for which he may be able to produce receipts, but the State shall have judgment and foreclosure of tax lien for any year or years sued for where the defendant can not offer receipt or other positive proof showing the payment of the claim for the taxes.

Section 2, above quoted, effectually denies to the owner, whether a delinquent, or a subsequent purchaser, the right to question the validity of the assessment, by making the accrued taxes, as well as the interest, fees and costs, created by sections 6 and 9 of the act, a charge against the land, "although the owner be unknown, or though it be listed in the name of a person not the actual owner, and though the ownership be changed."

Sections 3, 5 and 6 provide that the lien and charges created by section 2 shall be enforced by suit, on all lands that have been sold for taxes since the 1st day of January, 1885, and prior to the passage of the act. There is no waiver of the

State's claim under the tax sale. The delinquency of every person sued under this act is established not by an assessment, but by the fact that the land involved had been previously sold to the State. A subsequent purchaser, is by the decision in this case, if not by the act itself, denied the right to bring in the delinquent owner under whom he claims. The act, section 6, also deprives him of making any defense unless he can swear to the existence of facts which in all probability could only be known to his grantor. And section 15 denies him the right to make any defense save that of payment of the taxes claimed in the suit which is brought under and by virtue of the lists made out under the supervision of the Commissioners' Court, and not by virtue of an assessment roll by the assessor or a delinquent roll made by the collector of taxes.

Section 7 provides that the proper parties shall be made defendants, and that the same proceedings shall be had, etc. The act does not specify who are proper parties. A reasonable presumption would be, we submit, that the proper parties were those who had been assessed and had become delinquent under the law. Under the rulings on the demurrers in this case it would seem that the county attorney, and not the law, must determine who is the proper party, and that whoever the county attorney wishes to estop by the foreclosure sale is the proper party defendant.

Under this act, it is clear that there was no chance for the defendant to assert any equities or make any defense save that of payment, and he was made a party simply to estop him by a decree, which carried with it the presumptions incident to a foreclosure of a lien in a court of general jurisdiction.

II.

Referring to First and Third Specifications of Error (pages 11 and 16), submitted as propositions, and to counter-propositions, on pages 14 and 20 of the brief of defendant in error, and first, to the counter-proposition on page 14. The power of the legislature to prescribe whatever procedure it may deem

expedient for the collection of taxes, or for the enforcement of the lien for taxes, is limited by the constitutional requirement of "due process" in State and Federal constitutions, and we have in the preceding article endeavored to point out the features of the act of 1897, and the rulings of the State court in relation to the collection of taxes accruing prior to the passage of the act, which plaintiff in error claims to be arbitrary and designed to force all claimants, whether delinquents or not, to pay the back taxes claimed, or to abandon their property. We do not contend that a change of remedies is prohibited even by the clause of the State constitution prohibiting retroactive laws, but that under the guise of changing the remedy there is an arbitrary attempt to change the relative status of the State, and the owners of lands that the State was seeking to subject to a lien for the back taxes, as it existed at the date of the act of 1897.

Our next contention is, that defendant in error, under the semblance of prescribing a remedy by foreclosure of the constitutional lien for taxes accruing prior to the passage of the act, has in effect tacked on to the assessed taxes certain arbitrary charges under the semblance of interest, costs of assessment and of collection, etc.—changes retroactively imposed—and for that reason retroactive penalties.

The objection to these charges is two-fold.

First, they are retroactive and prohibited by the State constitution. It may be suggested that, whether this law violates the State constitution, is a question on which this court will follow the decision of the State court. But we submit that the State court has not decided this question; that it remains to be decided in some case where counsel representing the defense may be more cautious than the counsel in this case, and may refrain from making any reference in his pleadings to the sale for taxes of 1884.

Associate Justice Brown, in delivering the opinion of the Supreme Court of Texas, says:

"No attack is made upon the sale nor upon any of the proceedings leading up to it and it stands before the court,

under the defendant's allegations, as a valid sale by which the title passed to the State." * * * "This conclusion is based upon the fact that the title in the State is perfect and it is not intended to express an opinion on the question when the proof does not show this fact." * * *

We respectfully submit that plaintiff in error was entitled to a decision of this retroactive feature of the law—more fully discussed under Third Specification of Error (brief, p. 16).

Secondly, we submit, the six per cent per annum interest, prescribed by section 6 of the act, and not by the redemption clause (sec. 13) as contended by counsel for the State, as well as the other charges retroactively imposed, are obnoxious to the Constitution of the United States, because when imposed retroactively, these charges can not, from the very nature of the case, be either interest or penalties imposed for the violation of a duty, and said charges are arbitrary exactions and imposed through a proceeding the necessary effect whereof, is to force any claimant of the lands, although as to these charges, his delinquency has not been established, to pay the charges or give up his land.

This objection is not based, merely, on the fact that these charges are retroactive, but that having been retroactively imposed, they can not be, from the inherent nature of the charges themselves, lawful exactions of interest or penalties, and in this connection we suggest—in reply to the suggestion of our State courts and of counsel, to the effect that plaintiff in error was a delinquent, knew that the taxes were due, and that it was his duty to have paid these taxes during the period between 1889 and 1897 when the act was passed—the State was claiming, as shown by its petition (Rec., 1), the 10 per cent penalty and the taxes of 1884, since adjudged in this suit to be unauthorized, and the only condition under the act of 1897, on which he could settle with the collector of taxes, was the payment of these unlawful claims. There had never up to 1897 been an assessment against him or an inquiry or report to determine his delinquency.

The law does not impose on the citizen a duty, when in the nature of things he can not be advised of that duty, and as to these back taxes plaintiff in error had a right to his day in court.

Our contention that charges of this character are arbitrary and illegal exactions, is sustained in State vs. Certain Lands (39 Minn., sec. 42, N. W., 477; cited also by opposing counsel, brief 19). The only difference between this case and the case at bar being that in this Minnesota case, the interest and other charges were added to, taxes omitted from prior assessments and retroactively imposed, as may be done in this State as well as in Minnesota, while in the case at bar the taxes had been assessed for each preceding year, and said taxes became delinquent under the law on the 1st day of January of each year. The principle is, we submit, the same, and we quote from the opinion by Mitchel, J., as follows:

"Now as the whole tax extended against a tract of land is an entirety, the owner can not pay a part of it without paying the whole, and if a part is illegal and he pays the whole, ordinarily it would be a voluntary payment and he could not recover back the illegal part. Hence in such case his only remedy is to wait until proceedings are commenced to force judgment against his land, and then to defend against the illegal part of the tax; and until it is deducted from the judgment of the court he has had no opportunity to pay the valid part of the tax, and consequently has been guilty of no default. Therefore, whether it be a case of 'current' tax, or an 'omitted' tax, if a party succeeds in his defense as to part of it as illegal, all the penalties on the whole tax previously imposed for its non-payment were unauthorized and can not be included in the judgment. This is precisely the present case. *That part of the tax assessed and extended against the lands in 1886 as 'back interest' was, as we have already decided, unauthorized and illegal.* To that extent appellant had a valid defense which it had a right to interpose, and in which it was entitled to succeed. Until the correct amount of the taxes had been determined by excluding this illegal addition, it had not been

in default, and no penalties could be legally imposed."

The foregoing reasoning was applied in a proceeding in rem to enforce an assessment charged, as presumably, it might be in Minnesota, directly against the land without regard to the ownership, and applies with greater force in this State, where the land must be assessed to the owner, if known, and it is sought to enforce these arbitrary charges against a claimant who acquired the land, after the taxes had become delinquent, and after they had been in many instances assessed as the property of other individuals, as to whom no privity of title or estate is shown in this case.

This case is cited by counsel, if we understand their contention (brief, 19), to show that the interest and other penalties, retroactively imposed in by the act of 1897, are legal. We submit that it sustains precisely the converse of the proposition, and that, moreover, sustains our contention, that the statute of 1897 is a denial of due process—as the statutes of Minnesota construed in that case, it would seem from the opinion, gave the owner almost every conceivable defense, except the one of contesting these charges.

This act of 1897, we submit, provides a second listing and assessment of property, and the addition of the charges specified without giving the owner charged by the original assessment any opportunity to be heard before this suit was brought, and that in this suit he has been denied a hearing by the force and operation of this act of 1897, and that the State courts refusing to inquire into the validity of the said charges have disposed of in this case upon one issue, not raised, by the pleadings and contradicting the allegation of the State's petition to the effect that the State has a lien for taxes.

REMARK.—Referring to the suggestions of counsel for the State as to delinquency refusal, or failure to pay taxes, difficulties in the way of enforcing taxes, and any implied contumacy, if such there be, of plaintiff in error, in failing to pay his taxes, asking pardon for our digression, we will state that counsel is correct so far as the confusion is concerned, that the tax proper as annually assessed on land is a lien un-

der the constitution which should be paid, but we believe this might have been accomplished, without multiplying the fees of the various officials, until in many instances they largely exceed the tax claimed. As to the prospective charges, this is a matter of State policy, but as to these, burdens which were not incidents of the tax, plaintiff in error, after repeated effort ever since he acquired these lands to ascertain the amount of taxes on his lands, and after repeated efforts to settle on any reasonable basis, have failed, now invokes the revisory jurisdiction of this Honorable Court.

Respectfully submitted,

Counsel for Plaintiff in Error.